if the plaintiffs had outstanding debts due to them after the transitional period of three months had elapsed then their remedy might well be to apply to the Court, under the Companies Ordinance, for the Bank to be wound up and a receiver appointed to collect the debts due.

In support of his argument that in trying to recover money it had lent to its clients in the course of its business the Bank was carrying on business, Mr. B. K. Das, for the applicant, cited a number of authorities:— *Theophile* v. *Solicitor-General*[2], *In re Reynolds*[3], and *Rawlinson* v. *Pearson*[4].

As a general proposition I entirely accept the conclusion to be drawn from these cases that, generally speaking, a person or firm does not cease to carry on business merely because "the shutters may have been put up", but continues until the sums due are collected and all debts paid. But the words "bank" and "banking business" are specifically defined in the Banking Ordinance, 1958. "Bank" means "any person who carries on banking business"; and "banking business" means "the business of receiving money on current or deposit account, paying and collecting cheques drawn by or paid in by customers, and making advances to customers". Paragraph 4 of the defendant's affidavit in support of this application states:—

"4. By a notice of action dated 23rd January, 1959, the plaintiffs' solicitors demanded payment of certain sums alleged to be due by me on overdraft account and stated: 'Our clients regret having to take this action but would inform you that under the provisions of the Banking Ordinance, 1958, they have been notified by Government to wind-up their business in terms thereof".

In my view, in seeking to recover the moneys due to them the plaintiffs were and are not "transacting a banking business" within the meaning of the prohibition contained in section 3 and within the definition of "banking business" as contained in the Ordinance itself. As I understand it, the mischief which the Ordinance seeks to avert is to prevent a person or company carrying on banking business in this country without being in possession of the requisite capital paid up in this country. To extend the meaning of the words "transacting banking business" so as to place a prohibition upon the plaintiffs taking action, in the course of winding-up their business, to recover overdrafts allegedly due to them, would be, in my view, to impose upon them an intolerable hardship and injustice not justified by the plain meaning of the words "banking business" as defined in the Ordinance.

Similarly, in my view section 5 must be construed as imposing a prohibition on the use of the word "bank" in relation to a business which is being actually carried on. I do not think that the section can be so construed as to place a prohibition upon the plaintiffs suing under the name and title of "The Bank of China" to recover debts allegedly due to them, in the course of winding-up their business.

For these reasons I am of the opinion, and I so order, that this application be dismissed with costs.

Application dismissed.

Solicitors: *Chang Min Tat; Hogan, Adams & Allan.*

THOMAS COWAN & CO. LTD. v. ORME

[O. C. J. (Chua J.) December 23, 1960]

[Singapore — Suit No. 1609 of 1959]

Contract of personal service — Covenant in restraint of trade — Time — Space — Whether restraint reasonable — Public policy — Monopoly of trade — Severability of covenant — Injunction.

The defendant entered into a contract of service with the plaintiffs who were carrying on business as White Ant and General Pest Exterminators and Fumigators. He covenanted that, on leaving the plaintiffs' employment, he would not "carry on the business of White Ant Exterminator or Fumigator anywhere in the Island of Singapore either by himself or in partnership with others nor shall he take employment with any person, firm or corporation carrying on the business of White Ant Exterminators or Fumigators or any such similar business until the period of three years has expired". After leaving the plaintiffs' employment, the defendant became a director in the Fumigation and Pest Control Co. Ltd., a company carrying on business as White Ant and General Pest Exterminators and Fumigators. The plaintiffs brought this action to restrain the defendant from being in breach of the above covenant.

Held: (1) although the covenant was reasonably necessary for the protection of the plaintiffs' business with regard to space and time as well as the nature of the defendant's employment, it was against public policy since to prevent the defendant from operating as a fumigator in Singapore would give the plaintiffs a virtual monopoly of the business. Hence the covenant was void and could not be enforced.

(2) the covenant, being a single covenant for the protection of the plaintiffs' whole business and not two covenants for the protection of the plaintiffs' two businesses, it could not be severed so as to allow its enforcement in part.

Cases referred to:—

(1) *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co. Ltd.* [1894] A.C. 535.

(2) *Underwood & Son* v. *Barker* [1899] 1 Ch. 300.

(3) *Attwood* v. *Lamont* [1920] 3 K.B. 571.

ACTION.

J. Grimberg for the plaintiffs.

E. W. Barker for the defendant.

Cur. Adv. Vult.

Chua J.: This action is brought to restrain the defendant, a former employee of the plaintiffs, from continuing to commit a breach of a restrictive term contained in a written agreement dated the 3rd August, 1955. By that agreement it was provided that the defendant

"On leaving the services of the employer for any reason whatsoever either pursuant to this Agreement or on any breach of this Agreement shall not carry on the

business of White Ant Exterminator or Fumigator anywhere in the Island of Singapore either by himself or in partnership with others nor shall he take employment with any person, firm or corporation carrying on the business of White Ant Exterminators or Fumigators or any such similar business until the period of three years has expired from the date of the employee leaving the services of the employer".

The plaintiffs, a limited company incorporated in Singapore, carry on business as, *inter alia*, White Ant and General Pest Exterminators and Fumigators. The defendant had joined the plaintiffs on the 1st January, 1955, and was employed in the business carried on by the plaintiffs and there was a Manager over him. During the last six months of 1956 the Manager went on leave and the defendant was appointed acting Manager and was in charge of the plaintiffs' office. The defendant left the plaintiffs with effect from the 31st December, 1958. In October, 1959, the defendant became a director in the Fumigation & Pest Control Co., Ltd., a company incorporated in Singapore and carrying on business as, *inter alia*, White Ant and General Pest Exterminators and Fumigators. Of this the plaintiffs complained as being a breach of the defendant's agreement and thereupon the plaintiffs brought this action.

The brief facts stated above are not in dispute but the defendant denies that he is in breach of the covenant of the agreement. The defendant says that the covenant is invalid "by reason of the fact that it imposes restrictions greater than are reasonably necessary for the protection of the plaintiff or in the interests of the public or is directed solely to preventing the defendant from entering into competition with the plaintiff".

The general rule is that all covenants in restraint of trade are *prima facie* void unless they are reasonable in reference to the interests of the parties concerned and to the interests of the public. The accepted test of the validity of an agreement in restraint of trade is found in the words of Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company, Limited.*[1] It is put shortly thus by Lord Macnaghten (at page 565):

"Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable — reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public".

The law laid down by Lord Macnaghten was applied to a contract of service in the case of *Underwood & Son* v. *Barker.*[2]

The onus of establishing that the covenant is reasonable as between the parties concerned is on the person who puts forward the covenant; but once it is shown that the covenant is reasonable as between the parties concerned, the onus of establishing that the covenant is unreasonable in reference to the interests of the public is on the party attacking the covenant.

Now the first point for consideration is, what are the interests of the employer that are to be protected? If the only object of the covenant is to restrain competition and nothing else then it will not be protected. The employer is undoubtedly entitled to have his interest in his trade secrets protected. He is also entitled not to have his old customers enticed away from him by solicitation or such other means. In this case evidence was adduced as to the nature of the plaintiffs' business, as to the employment of the defendant prior to joining the plaintiffs, and as to the duties involved by the position which the defendant occupied in the plaintiff company. I find that the defendant, by reason of his employment by the plaintiffs, acquired special knowledge and became acquainted with the trade secrets and information relating to the business of the plaintiffs and he is in a position to entice away the customers of the plaintiffs. In fact he has already enticed away one customer of the plaintiffs by offering prices lower than that of the plaintiffs and in two cases he had by letter solicited the custom of persons who were customers of the plaintiffs.

The next question for consideration is whether the covenant is bad in this case as going beyond what is reasonably necessary for the protection of the plaintiffs' business. It is submitted that the covenant is too wide both as regards space and time. Now can it be truly said that a restraint which is but co-extensive with the area traded over by the plaintiffs is unreasonable? The plaintiffs carry on business not only in Singapore but in the Federation of Malaya, Borneo and Sarawak, and the restriction is to Singapore only. In my opinion the restraint is not unreasonable. As to the second objection, a period of 3 years under the circumstances of this case is not too wide in my view. It is also submitted that the covenant is too wide in scope in that it prevents the defendant from carrying on business not only as White Ant Exterminators and Fumigators but as General Pest Exterminators. I can see no substance in this submission. All that the covenant does is to protect the business of the plaintiffs and nothing more. In my judgment the limits of space, time and scope in this particular case are no wider than is required for the reasonable protection of the plaintiffs.

So much for the reasonableness of the covenant as between the parties. It still remains to be considered whether such a covenant can be calculated to injure the public.

Now, evidence was adduced by the defendant as to the position in Singapore regarding fumigation with hydrogen cyanide and methyl bromide. There are only three persons who are licensed in Singapore to use hydrogen cyanide in the fumigation of premises, articles, ships and vehicles, and they are (1) the Manager of the plaintiff company, (2) another employee of the plaintiffs who is stationed in Kuala Lumpur and (3) the defendant. There are only two persons who are licensed in Singapore to fumigate with

the methyl bromide, and they are the Manager of the plaintiffs and the defendant. There are only two firms in Singapore doing fumigation, the plaintiffs and the defendant's firm, Fumigation & Pest Control Co. Ltd. It is clear that if the defendant is not allowed to operate the plaintiffs would have a virtual monopoly in Singapore as regards the fumigation by hydrogen cyanide and methyl bromide. In fact prior to the defendant's firm coming into existence the plaintiffs were the only firm in Singapore doing fumigation. It is of course against public policy to allow any particular trade to be monopolised. It is said by the plaintiffs that if there are more fumigators the immediate effect would be that in order to make fumigation pay there will be temptation to cut on expenses, like the amount of gas used and the number of men employed, with the result that the general service given to the public would deteriorate. Well, the evidence adduced before me is that, since the defendant's firm commenced business in competition with the plaintiffs, the charges for ship fumigation have dropped, which is a good thing, but there is no evidence that the standard of fumigation of ships has deteriorated. Of course if the standard fell the licensing authority has the power to cancel or suspend the operator's licence. I think the fears of the plaintiffs are unfounded.

After considering the evidence that I have before me, I am of the view that there should be more than one firm of fumigators in Singapore and that to prevent the defendant from carrying on as a fumigator would be unreasonable in reference to the interests of the public.

Now, the question then arises whether the covenant in this case, which not only prevents the defendant from carrying on the business of Fumigator but also of White Ant Exterminator, is void as being unreasonable in reference to the interests of the public. From the authorities it is clear that the covenant is valid if it is severable. Now, is the covenant severable and does it consist of two distinct covenants, one relating to the business of White Ant Exterminator and the other relating to the business of Fumigator? I do not think so. The plaintiffs are not carrying on two businesses but one business and there is really one covenant for the protection of the plaintiffs' whole business and not two covenants for the protection of the plaintiffs' two businesses. As it is a single covenant it cannot be severed so as to allow its enforcement in part; *Attwood* v. *Lamont*[3]. I am of the opinion, therefore, that the covenant is unreasonable in reference to the interests of the public and is void.

For the reasons I have given, this action fails and it must be dismissed with costs.

Action dismissed.

Solicitors: *Drew & Napier; Lee & Lee.*

DAUD v. IBRAHIM

[C. A. (Hill and Good JJ.A. and Hepworth J.) July 13, 1960]

[Penang — F.M. Civil Appeal No. 36 of 1959]

Practice and Procedure — Summons-in-Chambers — Res judicata — Kedah Limitation Enactment (No. 60) — Limitation Ordinance, 1953.

This was an appeal from an order of Barakbah J. on an application by way of summons-in-chambers to vary an order of the First Division of the High Court of Kedah made on February 17, 1940 which application was allowed by the learned Judge.

Held: (1) once the Magistrate had arrived at a decision which was upheld by the First Division of the High Court in the appellate jurisdiction the matter became *res judicata* on the principle in *Raja of Ramnad* v. *Velusami Tevar*[1], and as such the present High Court has no power to vary an order of the former High Court of Kedah;

(2) the summons in chambers was barred by limitation.

Per Good, J.A.: ". . . . . the purpose of the proceedings commenced by the summons-in-chambers here was to obtain execution of a judgment. Such proceedings must, under the Kedah Limitation Enactment (No. 60) which was repealed on February 18, 1953 be brought within twelve Muslim years from the date of the judgment; and, under the Limitation Ordinance, 1953 which came into force on February 19, 1953, within twelve Gregorian years from the date on which the judgment became enforceable."

Cases referred to:—

(1) *Raja of Ramnad* v. *Velusami Tevar & Ors.* A.I.R. 1921 P.C. 23.

(2) *Hatton* v. *Harris* [1892] A.C. 547, 564.

COURT OF APPEAL.

N. Sharma (*R. K. Sharma* with him) for the appellant.

S. Natha Singh for the respondent.

Good J.A. (with whom **Hill J.A.** and **Hepworth J.** agreed): This is an appeal from an order of Barakbah J. on an application by way of summons-in-chambers to vary an order of the First Division of the High Court of Kedah made on the 17th February, 1940, which application was allowed by the learned Judge.

The present respondent was the plaintiff in a Civil Suit filed in the Magistrate's Court in Alor Star in 1938 against two defendants of whom the second defendant is the present appellant.

The learned Magistrate in a judgment delivered on the 12th July, 1939, found:—

(1) that the respondent had bought a piece of land from the first defendant twelve years previously and had paid for it and had gone into occupation of it and continued in occupation until the date of the judgment;

(2) that after the respondent had bought and paid for the land the first defendant had sold it to the present appellant, although the appellant knew that the land had already been bought by the respondent.

On these findings of fact the learned Magistrate ordered the appellant to transfer the land to the respondent.

The appellant appealed to the Second Division of the High Court and his appeal was dismissed. He then appealed to the First Division of the High Court and this appeal was also dismissed.